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### Social Activism Through Shareholder Activism

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# Social Activism Through Shareholder Activism

Lisa M. Fairfax\*

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## *I. Introduction*

I will begin my talk with James Peck. James Peck is not only an important figure in American history and the history of the Civil Rights Movement, but he is also an important figure in corporate governance history and the history of shareholder activism. James Peck, who attended Harvard but never

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\* Alexander Hamilton Professor of Business Law, Founder and Director, Corporate Governance Initiative, George Washington University Law School. Special thanks to Professor Sarah Haan and the participants in the Civil Rights and Shareholder Activism Symposium at Washington and Lee University School of Law for their comments and insights as well as the student editors and members of the Washington and Lee University Law Review, particularly George Liang and Kyle Hess, for their editorial assistance. All errors, of course, are mine.

graduated, is the only person to have participated in the 1947 Journey of Reconciliation as well as the 1961 Freedom Rides.<sup>1</sup> The April 1947 Journey of Reconciliation was a form of activism designed to challenge segregation on interstate buses.<sup>2</sup> The Journey involved a two-week trip with sixteen men (eight black and eight white) who rode on buses throughout southern states in the United States.<sup>3</sup> During the Journey, either blacks sat in the front of the bus while whites sat in the back, or the two groups sat side by side.<sup>4</sup> Although the seating arrangement violated state law in the South, which mandated segregation,<sup>5</sup> such integrated seating had been declared constitutional and thus lawful by a recent 1946 Supreme Court decision declaring segregation in interstate travel an unconstitutional burden on commerce.<sup>6</sup> During the Journey, Peck was attacked by an angry white mob, and left with bruises, none of which required stitches.<sup>7</sup> The attack did not dissuade Peck from his activism. In May 1961, Peck participated in the Freedom Rides, another bus journey, believed to have been inspired by the Journey of

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1. See ROBERT HARRIS, THE COLUMBIA GUIDE TO AFRICAN AMERICAN HISTORY SINCE 1939 362 (2006) (“[Peck] is the only person to have participated in both the 1961 Freedom Rides and the 1947 Journey of Reconciliation, when he was also attacked by racist whites.”); see also DEREK CATSAM, FREEDOM’S MAIN LINE: THE JOURNEY OF RECONCILIATION AND THE FREEDOM RIDES 74 (2009) (listing the white participants of the Freedom Rides).

2. See CATSAM, *supra* note 1, at 13 (stating that the purpose of the Journey of Reconciliation was to test the application of the Supreme Court decision in *Morgan v. Virginia* outlawing Jim Crow seating for interstate passengers).

3. See *id.* (“The Journey originated in Washington, D.C., and carried through Virginia, North Carolina, Tennessee, Kentucky, and back through Virginia before returning to Washington.”).

4. See *id.* (stating that the seating arrangement violated Jim Crow laws, which required blacks and whites to sit separately).

5. See, e.g., Frances L. Edwards & Grayson B. Thompson, *The Legal Creation of Raced Space: The Subtle and Ongoing Discrimination Created Through Jim Crow Laws*, 12 BERKELEY J. OF AFRICAN-AM. L. & POL’Y 145, 151 n.23 (2010) (noting that Alabama segregated “buses, trains, restaurants, pools, billiard rooms and toilet facilities” well into the 1960s, while theaters, telephone booths, and circus events were segregated in Virginia, Oklahoma, and Louisiana, respectively).

6. See *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (holding that Virginia state law enforcing segregation on busing was unconstitutional).

7. See CATSAM, *supra* note 1, at 29–30 (“When James Peck . . . left the bus to post bail . . . a large man . . . smashed him in the head with his fist . . .”).

Reconciliation.<sup>8</sup> Like the participants in the Journey, Freedom Riders—as the bus riders became known—rode on buses throughout the South with whites in the back and blacks in the front or blacks and whites seated side by side.<sup>9</sup> And like the Journey, such a seating arrangement violated state laws but had been sanctioned by federal law.<sup>10</sup> Not only had the Interstate Commerce Commission explicitly concluded in 1955 that segregated busing on the interstate was unlawful,<sup>11</sup> but in 1960 the Supreme Court, essentially for the second time, also declared segregated busing in interstate travel illegal.<sup>12</sup>

Thus for his second time, and as the only holdover from the Journey, Peck participated in a bus journey aimed at forcing southern states and their businesses to comply with federal law.<sup>13</sup> The first Freedom Ride began on May 4, 1961 and lasted for more than seven months.<sup>14</sup> Two buses began the journey, which started

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8. *See id.* at 151 (explaining that James Peck, and other Freedom Riders, expected violence because of Peck's previous experience with the Journey of Reconciliation).

9. *See id.* (explaining that at least one Freedom Rider sat in a manner that did not violate state law so that individual could avoid any potential arrest, and thus help the other Freedom Riders if they were jailed).

10. Interstate Commerce Act, 49 U.S.C. §§ 3–22 (Supp. 1925).

11. *See Sarah Keys v. Carolina Coach Co.*, 64 M.C.C. 769 (1955) (banning segregation of passengers on buses that are traveling across state lines); *NAACP v. St. Louis-Santa Fe Ry. Co.*, 297 I.C.C. 335, 347–48 (1955) (holding that law which makes it unlawful for a rail carrier to discriminate for any reason extends to waiting rooms and lunch rooms).

12. *See Boynton v. Virginia*, 364 U.S. 454, 463 (1960) (overturning the conviction of a black law student for sitting in a restaurant at a “whites only” bus terminal; holding that racial segregation in public transportation was illegal and that the federal government had the power to ban such segregation for the entire busing industry because of its impact on interstate commerce).

13. *See Susan Eckelmann, Freedom Rides*, *ENCYCLOPEDIA OF ALA.* (July 24, 2008), <http://www.encyclopediaofalabama.org/article/h-1605> (last updated Aug. 27, 2018) (last visited Sept. 12, 2019) (“They aimed to test the enforcement of the 1960 Supreme Court *Bruce Boynton v. Virginia* ruling that required desegregation of interstate bus seating and terminal facilities.”) (on file with the Washington and Lee Law Review).

14. *See id.* (stating that the Congress of Racial Equality organized the Freedom Rides, and that the Freedom Rides were modeled after the Journey of Reconciliation). The Freedom Rides pressured the Interstate Commerce Commission to finally enforce its 1955 decision declaring segregated busing illegal and hence led directly to regulations that dismantled segregation in public transportation. *Id.*

in Washington, D.C. and were to travel through Georgia, Alabama, and Mississippi and end in Louisiana.<sup>15</sup> The first bus to depart from Washington, D.C. was a Greyhound Corporation (“Greyhound”) bus, which never completed the journey.<sup>16</sup> On Mother’s Day, May 14, 1961, a mob of Klansmen bombed the Greyhound bus when it arrived in Alabama.<sup>17</sup> Pictures of the Greyhound bus—bombed and on fire—were splashed across the nation and have now become an iconic symbol of the violence with which some were willing to resist desegregation.<sup>18</sup> Peck boarded the second bus—a Trailways bus.<sup>19</sup> The Trailways bus pulled into the Greyhound bus terminal in Alabama an hour after Klansmen had burned the Greyhound bus.<sup>20</sup> The Trailways bus was met by a group of whites and Klansmen who proceeded to beat Peck and the other Freedom Riders.<sup>21</sup> That beating did not stop Peck and his fellow bus riders. After receiving stitches, Peck and the other Freedom Riders got back on the bus and continued their journey through Alabama.<sup>22</sup> In Birmingham, Alabama, the bus was met by police commissioner Bull Connor and yet another crowd of Klansmen.<sup>23</sup> Peck and others on the bus were severely beaten

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15. See Eckelmann, *supra* note 13 (explaining that the Freedom Riders’ purpose was to force the federal government to intervene); CATSAM, *supra* note 1, at 69–70 (describing the proposed itinerary).

16. See Eckelmann, *supra* note 13 (clarifying that the Greyhound never completed the journey because the mob of Klansmen burned down the bus).

17. See *id.* (stating that despite a warning of future attacks in Alabama, the Greyhound bus continued on its path).

18. See CATSAM, *supra* note 1, at 151–54 (“The picture of the immolated bus, snapped by an intrepid local freelance news photographer on the scene, Joe Postiglione, would become iconic, one of the most famous pictures in American history.”).

19. See *id.* at 157 (stating that James Peck became a victim and was beaten when he tried to stop the attack).

20. See Eckelmann, *supra* note 13 (noting that the Trailways bus was greeted by a smaller mob).

21. See CATSAM, *supra* note 1, at 156–57 (“Peck received several punches and kicks and blows with Coke bottles and soon found himself facedown on the bus floor with someone on top of him.”).

22. See *id.* at 167 (stating that after eight hours in the hospital, James Peck called the bus driver to pick him up).

23. See Eckelmann, *supra* note 13 (stating that Bull Connor had informed Klansmen that he would delay arrival of the police so that the Klan could attack the riders).

with baseball bats, iron pipes, and bicycle chains.<sup>24</sup> They were taken to the hospital, but refused treatment because it was a segregated hospital.<sup>25</sup> When he finally received treatment, it was fifty stitches to a head wound for Peck.<sup>26</sup> Peck's participation in the 1951 Freedom Rides gained him a certain level of notoriety. Part of that notoriety stemmed from the fact that Peck was white, and in fact, it was later discovered that Klansmen had singled out white Freedom Riders for especially vicious beatings.<sup>27</sup> Like the bus burning, pictures of a beaten Peck and his fellow Freedom Riders were splashed across newspapers and televisions.<sup>28</sup> With those pictures, Peck gained notoriety for being a white Civil Rights Hero—and that he was.<sup>29</sup> A Civil Rights Hero—regardless of whether he was white or black.

Alas, this engagement with the Greyhound bus system was not Peck's first. Ten years earlier, in 1951, Peck was involved in another act of activism with Greyhound and its bus system.<sup>30</sup> In fact, it was 68 years ago, February 13, 1951, when Greyhound sent a letter to the Securities and Exchange Commission (SEC) informing the SEC of its intention to exclude Peck's shareholder proposal from the proxy statement related to Greyhound's upcoming annual shareholders meeting.<sup>31</sup> The proposal

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24. See Peter Carlson, *Ex-Freedom Rider James Peck Finds a New Villain Behind His Savage 1961 Beating—the FBI*, PEOPLE MAG. (Jan. 24, 1983, 12:00 PM), <https://people.com/archive/ex-freedom-rider-james-peck-finds-a-new-villain-behind-his-savage-1961-beating-the-f-b-i-vol-19-no-3/> (last visited Sept. 12, 2019) (describing the savage beating of Peck) (on file with the Washington and Lee Law Review).

25. See CATSAM, *supra* note 1, at 161 (“Birmingham was as segregated as ever as the city prepared its welcome for the Freedom Riders.”).

26. See *id.* at 167 (“His six largest gashes required fifty-three stitches, he had lost several teeth, and he was covered with bruises.”).

27. See *id.* at 166 (“Once against the worse beating of a Freedom Rider was reserved not for a black passenger . . . but rather for a white man seen as a traitor in the South.”).

28. See *id.* at 169–70 (listing different media outlets' responses to the Freedom Rides).

29. See *id.* at 188–89 (stating that James Peck, after the Freedom Rides, was the “bravest man in the world” and that Peck inspired students all across America to fight for civil rights).

30. See *Peck v. Greyhound Corp.*, 97 F. Supp. 679, 680 (S.D.N.Y. 1951) (involving Peck's suit against Greyhound for allegedly violating the Securities Exchange Act of 1934).

31. See *id.* (“It appears that by letter dated February 13, 1951, the

submitted by Peck was straightforward: “A Recommendation that Management Consider the Advisability of Abolishing the Segregated Seating System in the South.”<sup>32</sup> It is certainly worth noting that Peck submitted this proposal after the Journey of Reconciliation, and thus after the U.S. Supreme Court had found such a segregated seating system to be unconstitutional.<sup>33</sup>

Greyhound indicated that it intended to exclude Peck’s proposal from its proxy statement because the proposal was “not a proper subject” for shareholder action.<sup>34</sup> The Assistant Director of Corporate Finance at the SEC agreed, noting that while the subject (busing) clearly related to Greyhound’s business, in his view, it was also clear that the shareholder (Peck) was interested in “advancing a cause” and as a result the proposal was deemed not a proper subject.<sup>35</sup>

Peck then went to the courts and sought a temporary injunction to delay the annual meeting and to give him time to get the proposal on the proxy statement.<sup>36</sup> In refusing Peck’s efforts to temporarily enjoin the meeting, a District Court relied on administrative procedure issues to effectively sanction Greyhound’s actions.<sup>37</sup> In so doing, the court indicated that it was

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defendant corporation wrote the Securities Exchange Commission advising it of Plaintiff’s request and informing it that Defendant did not intend to include Plaintiff’s proposal in its proxy statement or form of proxy for the meeting of stockholders . . .”).

32. *Id.* Peck submitted the proposal in a letter dated October 23, 1950. *Id.*

33. *See Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (stating that a Virginia statute segregating races on commercial interstate buses is invalid).

34. *See Peck*, 97 F. Supp. at 680 (referencing Rule X-14A-8(a) of the proxy regulations cited by the defendant corporation).

35. *See* Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1555–56 (2006) (“[T]he SEC advised the Greyhound Corporation that it could omit the proposal because it involved ‘matters which are of a general political, social or economic nature’ . . .”).

36. *See Peck*, 97 F. Supp. at 680 (“The prayer for relief . . . asks that the defendant be enjoined from soliciting or obtaining proxies by means of letter or other matter . . . unless [his] proposal is included in the proxy material and on the agenda of the meeting.”).

37. *See id.* at 681 (“Rules and regulations adopted by administrative agencies pursuant to Congressional authorization are best interpreted, in the first instance, by the agency which has been entrusted with the power and authority to write them.”). The court gave deference to the SEC and denied the injunction based on the fact that Peck had not pursued available administrative

“unable to conclude that the denial of this temporary injunction will work irreparable harm and damage to the plaintiff.”<sup>38</sup> I suspect Peck and the Freedom Riders on the Greyhound bus would disagree.

In 1952, the SEC altered the shareholder proposal rule to exclude proposals made “primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes.”<sup>39</sup> The SEC did not reference Peck or otherwise acknowledge that its actions were prompted by Peck’s proposal. Instead, the SEC indicated that its change simply reflected a codification of a position the SEC staff had taken in 1945.<sup>40</sup>

Today, the shareholder proposal rule has evolved, giving way to several amendments that now enable shareholders to submit proposals on the proxy statement that involve significant policy issues that transcend economic significance to the corporation.<sup>41</sup> Nevertheless, we continue to grapple with the underlying corporate governance issues raised by Peck’s proposal. Those issues center around at least two questions: First, what constitutes proper subjects for corporate action? Second, what should be the shareholder’s role in advancing those subjects?

My talk today seeks to answer these two questions, particularly as they relate to the theme of this conference and the kind of activism engaged in by shareholders such as James Peck. Put a different way, those questions can be viewed as follows: First, can the pursuit of social justice be a proper subject of corporate action and behavior? My answer is yes. The for-profit company has proven that it can deploy resources to advance economic innovation and change. Art, music, technology, social

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remedies through the SEC to obtain a revision or review of the interpretation by the SEC’s Assistant Director. *Id.*

38. *Id.*

39. Solicitation of Proxies, 17 Fed. Reg. 11,431, 11,433 (Dec. 18, 1952).

40. See Securities and Exchange Commission, 11 Fed. Reg. 10,912, 10,995 (Sept. 27, 1946) (confirming that the intent of Rule X-14A-7 was to enable stockholders to solicit materials related to the affairs of the corporation).

41. See Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52,994, 52,997 (Dec. 3, 1976) (explaining changes to the routine business matters rule); see also LISA M. FAIRFAX, A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION 72–75 (2011) (stating that the SEC has struggled with “determining the dividing line” between ordinary business matters and social and political matters).



media, the sharing economy, all of these innovations reached the public through the for-profit corporation.<sup>42</sup> Why not use the vast resources and power of the for-profit corporation to be the engine for social innovation and change? As Larry Fink, the CEO of BlackRock, recently noted, “society is increasingly looking to companies, both public and private, to address pressing social and economic issues. These issues range from protecting the environment to retirement to gender and racial inequality, among others.”<sup>43</sup> Thus, my answer regarding the proper subject of corporate action is that what is deemed to be proper can and should encompass more than just the pursuit of profits.

Second, what role should shareholders play? Individual shareholders like Peck, as well as institutional shareholders ranging from pension funds to asset managers, have demonstrated that they are willing to play a role in helping corporations focus on more than short-term profit maximization.<sup>44</sup> I believe their actions are appropriate ones for shareholders to be undertaking. More importantly, I believe that both of my answers are aligned with a growing recognition from multiple stakeholders in the business community that for-profit businesses have a role to play in advancing and supporting important social issues,<sup>45</sup> and that shareholders have an important role to play in highlighting, defining, and shaping the contours of corporate engagement around those issues. My talk will confirm and support that recognition. In so doing, I will not only help you understand my response to the two corporate governance issues raised by Peck’s proposal, but also defend two

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42. See Carrie Kerpen, *How Has Social Media Changed Us?*, FORBES (Apr. 21, 2016, 11:21 AM), <https://www.forbes.com/sites/carriekerpen/2016/04/21/how-has-social-media-changed-us/#166fed0f5dfc> (last visited Sept. 12, 2019) (demonstrating that social media has increasingly made our lives public) (on file with the Washington and Lee Law Review).

43. Larry Fink, *Larry Fink’s 2019 Letter to CEOs, Purpose and Profit*, BLACKROCK (2019), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> (last visited Sept. 12, 2019) (on file with the Washington and Lee Law Review).

44. See *id.* (“Purpose guides culture, provides a framework for consistent decision-making, and, ultimately, helps sustain long-term financial returns for the shareholders of [the] company.”).

45. See *id.* (arguing that public companies must take a role in leading social change).

principles: (1) the ability of corporations to engage in social activism or otherwise to focus on issues related to the broader society, and (2) the ability of shareholders to play a pivotal role in such engagement.

My talk will have three parts. First, I will focus on that all familiar debate about corporate purpose. In this part, I will tackle some of the core arguments against a corporate purpose beyond strict profit maximization.<sup>46</sup> Second, I will focus on shareholders and defend their ability to engage in this space. In particular, I will grapple with the concerns that many have raised about increased shareholder power and the inadvisability of seeking to rely on shareholders to advance goals beyond profit.<sup>47</sup> Third, I will pinpoint some trends about which we should be mindful if we believe that corporations can and should pursue a broader purpose, and that shareholders can and should help corporations engage around those pursuits. I then will offer some concluding thoughts.

## II. *Revisiting the Corporate Purpose Debate*

There are several reasons why people may contend that focusing on social activism is not a “proper subject or purpose” for the corporation.<sup>48</sup> I will wrestle with three of them: the primacy of profit for the for-profit corporation,<sup>49</sup> the so-called “two-masters” problem,<sup>50</sup> and the notion that for-profit corporations should not make value-based decisions.<sup>51</sup>

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46. *Infra* Part II.

47. *Infra* Part III.

48. *See supra* notes 34–35 and accompanying text (discussing Greyhound’s reasons for dismissing Peck’s proposal).

49. *See, e.g.,* Dodge v. Ford Motor Co., 170 N.W. 668, 681 (Mich. 1919) (“The purpose of any organization under the law is earnings—profit.”).

50. *See* Stephen Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm, A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1435–42 (1993) (explaining that a conflict between shareholders and non-shareholders creates a “two masters” problem because “no one can serve two masters simultaneously”).

51. *See* Alan Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 880 (1994) (stating that the minimum shares ownership rule was intended to prevent shareholders from bringing activist proposals).

### A. *The Primacy of Profit*

There are many who continue to cling to the notion that corporations cannot pursue social objectives because corporations' sole purpose must be to pursue profit on behalf of shareholders—the so-called profit maximization norm.<sup>52</sup> There are several court cases that support this norm.<sup>53</sup> The oft-cited 1919 case of *Dodge v. Ford Motor Company*<sup>54</sup> that declared that “[a] business corporation is organized and carried on primarily for the profit of the stockholders”<sup>55</sup> is consistently used to support this norm. *Revlon v. MacAndrews & Forbes Holdings, Inc.*,<sup>56</sup> with its insistence that a corporation focus on maximizing value for its shareholders once a company is up for sale, is also often cited as confirmation of the shareholder maximization imperative.<sup>57</sup> Influential economists also have endorsed this imperative. For a visible endorsement, we need look no further than the title of Milton Friedman’s widely cited 1970 *New York Times* article: “The Social Responsibility of Business Is to Increase Its Profits.”<sup>58</sup>

While these oft-cited quotes may have rhetorical appeal, there are several ways in which they have been questioned if not outright debunked.<sup>59</sup> First, although there are admittedly many

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52. See generally Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533 (2006) (introducing the concept of shareholder primacy, wealth maximization, and corporations’ duty to religiously pursue shareholder profit).

53. See cases cited *infra* notes 54–56 and accompanying text.

54. 170 N.W. 668 (Mich. 1919).

55. *Id.* at 684.

56. 506 A.2d 173 (Del. 1986).

57. See *id.* at 182 (“The duty of the board has thus changed from the preservation of Revlon as a corporate entity and to the maximization of the company’s value at a sale for the stockholder’s benefit.”).

58. See Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM 12 (“[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game . . .”).

59. See, e.g., Stephen Bainbridge, *A Duty to Shareholder Value*, N.Y. TIMES (Apr. 16, 2015), <https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/a-duty-to-shareholder-value> (last visited Sept. 12, 2019) (voicing concerns that director discretion purportedly directed toward shareholder wealth maximization could “just be used to camouflage self-interest”) (on file with the Washington and Lee Law Review);

legal and extra-legal factors (including disclosure requirements) that may pressure corporations to focus on profit and even short-term profit, corporate law does not *require* profit-maximization.<sup>60</sup> In fact, when carrying out their fiduciary duties to act in the corporation's best interests, courts grant directors considerable discretion.<sup>61</sup> This discretion has meant that directors not only can focus on other constituents without breaching their fiduciary duty, but also that directors can make decisions that prioritize the interests of other constituents over shareholders and the pursuit of profits, particularly short-term profits.<sup>62</sup> By granting directors such discretion, courts have made clear that corporate law does not embody a profit maximization mandate, and as a result, directors can focus on issues beyond shareholders without violating the duty they owe to the corporation.<sup>63</sup>

Second, there has been a growing recognition by almost everyone in the corporate governance community that profit maximization is inexplicably tied to the pursuit of concerns that focus on other constituents and the broader society.<sup>64</sup>

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*see generally* Steven Pearlstein, *Businesses' Focus on Maximizing Shareholder Value Has Numerous Costs*, WASH. POST (Sept. 6, 2013), [https://www.washingtonpost.com/business/economy/businesses-focus-on-maximizing-shareholder-value-has-numerous-costs/2013/09/05/bcdc664e-045f-11e3-a07f-49ddc7417125\\_story.html?utm\\_term=.abd07bc8a1d2](https://www.washingtonpost.com/business/economy/businesses-focus-on-maximizing-shareholder-value-has-numerous-costs/2013/09/05/bcdc664e-045f-11e3-a07f-49ddc7417125_story.html?utm_term=.abd07bc8a1d2) (last visited Sept. 12, 2019) (arguing that there is no empirical evidence that maximizing a company's share price makes the economy or our society better off) (on file with the Washington and Lee Law Review).

60. *See* Pearlstein, *supra* note 59 ("There are no statutes that put the shareholder at the top of the corporate priority list . . . . Nor does the law require, as many believe, that executives and directors owe a special fiduciary duty to shareholders.").

61. *See* Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 439–40 (2002) (arguing that constituency statutes and the business judgment rule allow directors considerable discretion in their duty to the shareholders).

62. *See id.* at 440 ("[T]here is no modern case in which a court has overturned a manager's decision because that decision placed public interests above shareholder interests.").

63. *See id.* at 442 (using the illustration of *Shlensky v. Wrigley* to argue that modern corporate case law allows directors to pay heed to the concerns of non-shareholders).

64. *See* Larry Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1436 (2006) ("[M]anagers who

Institutional investors see the link, which is why the top three asset managers—BlackRock, State Street, and Vanguard<sup>65</sup>—have begun making public statements designed to ensure that corporations are making the link.<sup>66</sup> These groups and other shareholders have come to recognize the link between what happens in the economic sphere and what happens in broader society.<sup>67</sup> Thus, these groups have come to acknowledge that corporations cannot maximize profit without appropriate attention to other stakeholders.<sup>68</sup> Corporations need employees to work, they need creditors to lend, they need suppliers to supply, they need consumers to purchase, and they need the community to support or there will be no profits. Because corporations operate within the confines of society they have to consider these other groups as well as broader environmental and social issues.<sup>69</sup> In other words, corporations exist in society, and thus

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carefully attend to the firm's profits must also seek at least to some extent to further society's interests.”).

65. See Melissa Sawyer & Marc Trevino, *Review and Analysis of 2017 U.S. Shareholder Activism*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 10, 2018), <https://corpgov.law.harvard.edu/2018/04/10/review-and-analysis-of-2017-u-s-shareholder-activism/> (last visited Sept. 12, 2019) (stating that these three index fund providers own 18.5% of the S&P 500) (on file with the Washington and Lee Law Review).

66. See Fink, *supra* note 43 (addressing CEOs of companies in which BlackRock invests and discussing links between purpose and profit); see also 2016 Corp. Resp. Rep., ST. STREET 3 (2016), [http://www.statestreet.com/content/dam/statestreet/documents/values/StateStreet\\_2016\\_CorporateResponsibilityReport.pdf](http://www.statestreet.com/content/dam/statestreet/documents/values/StateStreet_2016_CorporateResponsibilityReport.pdf) (emphasizing the importance of creating value for clients and shareholders, engaging employees and suppliers, and supporting communities and the environment).

67. See Fink, *supra* note 43 (“Companies that fulfill their purpose and responsibilities to [non-shareholder] stakeholders reap rewards over the long-term.”).

68. See *id.* (“Profits are essential if a company is to effectively serve all of its stakeholders over time—not only shareholders, but also employees, customers, and communities.”); see also Rob Robins, *Does Corporate Social Responsibility Increase Profits?*, BUS. ETHICS MAG. (May 5, 2015), <http://business-ethics.com/2015/05/05/does-corporate-social-responsibility-increase-profits/> (last visited Sept. 12, 2019) (observing that corporate citizenship can “result in higher sales, enhance employee loyalty, and attract better personnel to the firm”) (on file with the Washington and Lee Law Review).

69. See *Corporate Citizenship: Profiting from a Sustainable Business*, THE ECONOMIST, Nov. 2008, at 6, [http://graphics.eiu.com/upload/Corporate\\_Citizens.pdf](http://graphics.eiu.com/upload/Corporate_Citizens.pdf) (noting that the management of a firm's economic, social, and environmental impacts can show visible effects on bottom

are not immune from social forces. To continue to thrive in the future, corporations must begin asking questions that could impact the future. How will broader societal discussions impact reputation? How will those discussions impact the corporation's ability to attract customers and suppliers? The growing understanding that corporations have to consider these broader issues negates the presumption that corporations must focus only on profit.

Greyhound illustrates that these broader issues can have a direct impact on the corporation's business model and thus bottom line.<sup>70</sup> For Greyhound, it was not simply the fact that society was beginning to more fully embrace its commitment to equal justice and equal treatment, but that Greyhound's own business model was deemed both illegal and antithetical to such an embrace. In this regard, the failure of Greyhound corporate officers and directors to sufficiently consider the impact of those broader social discussions and sentiments and the manner in which they would impact its business should be viewed by corporate governance experts as problematic at best.

Recent events also illustrate this point. Broader concerns about gun violence and school shootings have prompted shareholder activism impacting various businesses.<sup>71</sup> Along these same lines, sexual misconduct scandals have prompted shareholder actions with repercussions for corporations.<sup>72</sup> While these debates are contentious, the activism aimed at corporations (from both sides of the debates) highlight the fact corporations are not immune from the social climate around them.

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line—revenue growth, increasing profit, and cost savings).

70. See Fink, *supra* note 43 ("Profits and purpose are inextricably linked.").

71. See Shirley Westcott, *Surprises from the 2018 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 27, 2018), <https://corpgov.law.harvard.edu/2018/06/27/surprises-from-the-2018-proxy-season/> (last visited Sept. 12, 2019) (reporting that a group of faith-based investors were able to rally majority shareholders—including those from BlackRock—to back a proposal attempting to address gun violence and promote gun safety) (on file with the Washington and Lee Law Review).

72. See *id.* (stating that the Wynn Resorts scandal involving allegations of sexual misconduct by the founder and former Chairman/CEO has alerted shareholders to take preemptive measures at other corporations).

Third, to the extent corporations have some obligation to align their interests with those of shareholders, the clear rise in shareholder concern around environmental and social issues underscores the fact that corporations must focus on issues beyond profit.<sup>73</sup> As history reveals, individuals like Peck have chosen to use their influence and authority as shareholders to highlight broader issues because they care about those issues.<sup>74</sup> Today, institutions with significant assets, like large public pension funds and large asset managers, are expressing their concerns around these issues.<sup>75</sup> In this regard, the growing support within the investment community around issues beyond profit renders any presumption that corporations must focus exclusively on profit increasingly untenable.<sup>76</sup>

Fourth, there is some recognition that the pursuit of profit without regard to other issues increases the likelihood that corporations may engage in unethical and illegal behavior. That is why on the heels of every great corporate scandal comes the increased pressure for better corporate citizenship.<sup>77</sup> This pressure stems from a belief that providing corporate actors with

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73. See, e.g., *2018 Proxy Season Review*, SULLIVAN & CROMWELL LLP, July 12, 2018, at 1, <https://www.sullcrom.com/files/upload/SC-Publication-2018-Proxy-Season-Review.pdf> (reporting that environmental/social/political (ESP) proposals gained momentum in the 2018 proxy season); HOLLY J. GREGORY, STRATEGIC SHAREHOLDER ENGAGEMENT: PRACTICAL AND LEGAL CONSIDERATIONS IN BOARD SHAREHOLDER ENGAGEMENT IN THE NEW INVESTOR ENVIRONMENT 3 (2018), <https://www.sidley.com/-/media/publications/nacd-governance-challenges--boardshareholder-engagement-in-the-new-inv-002.pdf> (noting that environmental, social, and governmental (ESG) change and sustainability represent the most prevalent issues raised by shareholders seeking engagement in 2017).

74. See Fink, *supra* note 43 (explaining that social activism has become increasingly important for shareholders).

75. See Sawyer & Trevino, *supra* note 65 (“[I]ndex funds, public pension funds and large activists alike place a strong emphasis on environmental, social and governance [] parameters.”).

76. See *supra* notes 73–75 and accompanying text (illustrating other priorities among corporate directors and shareholders).

77. See Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 704–5 (2006) (“During corporate misconduct, such as the recent scandals involving corporate fraud like WorldCom, corporations feel pressured to demonstrate a commitment to ethical values.”).

a goal beyond profit will ensure that they act in more ethical and beneficial ways.<sup>78</sup>

Fifth, state incorporation law itself belies the notion that corporations have a mandate to focus on profit.<sup>79</sup> What do you need to do to become a corporation? For what purpose do you need to organize? A review of any state incorporation statute will reveal that those statutes do not include a profit maximization requirement.<sup>80</sup> No state incorporation statute mandates that corporations pursue or focus on profit.<sup>81</sup> Instead, state incorporation statutes indicate that in order to become a for-profit corporation the business entity must seek to engage in a lawful business purpose.<sup>82</sup> The pursuit of profits is not a purpose. This means that corporations must have some purpose beyond profit. As Larry Fink noted, “[p]urpose is not sole pursuit of profits, but the animating force for achieving them.”<sup>83</sup> Profits help support purpose, profits result from purpose, but profits do not give the corporation a purpose. Purpose comes from whatever business venture is being pursued. In order to appropriately pursue that venture, corporations need the help of the rest of the constituents in the corporate environment.<sup>84</sup> Corporations that fulfill their purpose appropriately reap profits.<sup>85</sup> In other words, the pursuit of profits is not and cannot be an end in itself.

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78. See *id.* at 692 (calling attention to the global trend of companies adopting mission statements that de-emphasize shareholder profit and highlight the corporation’s commitment to its constituents and the broader community).

79. See Pearlstein, *supra* note 59 (remarking that in most states, corporations can be formed for “any lawful purpose”).

80. See Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, & Organic Documents*, 74 WASH. & LEE L. REV. 939, 948 (2017) (agreeing that no statutory framework regarding officer and director management or conduct even mention—much less require—action in a manner that maximizes shareholder wealth or compels shareholder primacy).

81. See *id.* (explaining that a significant number of states have adopted “other constituency” legislation that allows management to consider the effects of corporate action on a variety of other non-shareholder stakeholders).

82. See DEL. CODE ANN. tit. 8, § 101 (2016) (“A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purpose . . .”).

83. Fink, *supra* note 43.

84. See Heminway, *supra* note 80, at 948, 971 (emphasizing the importance of considering the effects of corporate action on a variety of other stakeholders).

85. See Fink, *supra* note 43 (“[P]rofits and purpose are inextricably



In this regard, while profits are undeniably an important aspect of the for-profit corporation, not only is there nothing in corporate law that dictates a corporate purpose focused only on profits, but an appropriate understanding of the corporation and its place in society reveals that such a focus would be inappropriate, inadvisable, and undesirable.

### *B. The Two-Masters Conundrum*

Another common objection to a corporate focus on concerns beyond profits relates to the “two-masters” problem.<sup>86</sup> It is a Biblical verse, with a corporate twist. The twist is basically that if we tell our corporate officers and directors that they have to pursue more than one objective—profits and something else—chaos will reign.<sup>87</sup> Directors will be confused about who to serve and whose interests to prioritize.<sup>88</sup> Perhaps more importantly, the two-masters problem will undermine our ability to hold directors accountable because directors will play stakeholders off of one another, or otherwise will always be able to justify their decisions by suggesting that they benefit one of a number of groups.<sup>89</sup> This will prove that maxim—those who are accountable to everyone are really accountable to no one.<sup>90</sup>

While the corporate effort to balance competing concerns is valid, the confusion argument does not adequately acknowledge the reality of corporate decision-making. Indeed, the confusion

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linked.”).

86. See Fairfax, *supra* note 61, at 433 (“[W]hile the interests of shareholders and other groups often coincide, occasionally it is impossible for directors to pursue the concerns of all groups.”); see also Bainbridge, *supra* note 50, at 1435–42 (discussing the “two masters” problem).

87. See Bainbridge, *supra* note 50, at 1435 (“[M]anagement occasionally faces situations in which it is impossible to advance shareholder interest and to protect simultaneously non-shareholders from harm.”).

88. See Fairfax, *supra* note 61, at 433 (“[O]ccasionally, it is impossible for directors to pursue the concerns of all groups.”).

89. See *id.* (reasoning that insulating directors’ decisions even when they have no appreciable benefit for shareholders allows managers to further their own personal interests).

90. See FRANK E. EASTERBROOK & DANIEL FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 38 (1991) (“[A] manager told to serve two masters . . . has been freed of both and is answerable to neither.”).

argument begs a vital question: Why are we pretending that corporate officers and directors only focus on a single stakeholder—the shareholders—and a single interest—profit? The reality is that corporations engage in balancing competing interests all the time.<sup>91</sup> This reality undermines the notion that directors will experience confusion if we give them the flexibility to consider issues other than profit. In addition, by failing to acknowledge the reality that such balancing is already occurring, we make this form of balancing seem like a secret that directors and officers must hide. By failing to acknowledge this reality, we also give credence to the idea that this form of balancing is beyond the capabilities of officers and directors rather than a skill around which they have historically engaged.<sup>92</sup>

The concern with respect to accountability also misses the point. Indeed, to the extent the ability to serve multiple interests creates an accountability issue, such an issue already exists. This is because directors are afforded significant flexibility to make decisions that focus on other constituents or otherwise to make decisions that preference the interests of other constituents, over shareholders.<sup>93</sup> In this regard, the flexibility in the current

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91. See Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1418 (1993) (“[F]iduciaries of various sorts commonly find themselves pulled between compelling duties.”); Margaret M. Blair, *Boards of Directors as Mediating Hierarchs*, 38 SEATTLE U. L. REV. 297, 313 (2015) (“In a complex business environment, directors must inevitably consider the various competing ideas and interests at stake, and make judgment calls and tradeoffs.”); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 281 (1999) (viewing directors as “trustees for the corporation itself . . . mediating hierarchs whose job is to balance team members’ competing interests” in a fashion that keeps the productive coalition together).

92. See Blair & Stout, *supra* note 91, at 286 (“[O]ur claim that directors should be viewed as disinterested trustees charged with faithfully representing the interests . . . of all team members[] is consistent with the way many directors have historically described their own roles.”); see also Robert J. Samuelson, *I Love Coke’s Report*, WASH. POST (Apr. 16, 1997), [https://www.washingtonpost.com/archive/opinions/1997/04/16/i-love-cokes-report/a590afec-44eb-4d4d-b81b-9a3c4668e54a/?utm\\_term=.3e34a1e383c7](https://www.washingtonpost.com/archive/opinions/1997/04/16/i-love-cokes-report/a590afec-44eb-4d4d-b81b-9a3c4668e54a/?utm_term=.3e34a1e383c7) (last visited Sept. 12, 2019) (noting that the American Can Company’s 1971 annual report emphasized management’s need to satisfy “the legitimate needs of all three participating partners—our customers, our owners, and our employees”) (on file with the Washington and Lee Law Review).

93. See *supra* notes 61–63 and accompanying text (discussing the deference afforded directors through case law and state corporation statutes).

corporate governance regime creates an accountability problem irrespective of whether directors choose to use that flexibility to focus on social concerns.<sup>94</sup> Perhaps more importantly, the failure to acknowledge that directors can and may be using their flexibility to focus on issues beyond profit may undermine accountability in at least two ways: First, allowing directors flexibility but forcing them to deny or otherwise refuse to acknowledge the manner in which they are actually using that flexibility impedes accountability by making it difficult to fully understand how and in what fashion directors are making critical decisions.<sup>95</sup> Second, this situation creates a disclosure gap that undermines accountability. The notion that the balance among interests beyond profits is not supposed lends credence to the notion that shareholders and the public are not entitled to information about such interests and the balance.<sup>96</sup> If shareholders and the public are not entitled to information about certain issues and concerns, then they cannot determine how those issues and concerns are being balanced, and hence cannot monitor directors or otherwise hold directors accountable for the decisions being made in this arena.

### *C. The Corporation Has No Values*

Third, some have argued against a corporate focus on profits by contending that corporations should not be in the business of making value judgments.<sup>97</sup> This insistence encompasses at least

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94. See Fairfax, *supra* note 61, at 433 (arguing that the large amount of discretion that directors possess allow them to pursue self-centered objectives); see also Blair, *supra* note 91, at 300 (positing that the business judgment rule “seriously undermines . . . accountability to shareholders by virtually insulating directors”).

95. See Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 419, 436 (2001) (expressing concern over an outside observer’s ability to determine how well directors use corporate assets and otherwise take corporate action).

96. See Palmiter, *supra* note 51, at 925 (stating that the minimum shares ownership rule was intended to prevent shareholders from bringing activist proposals); see also Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 420 (2006) (emphasizing shareholders’ very limited right to information about the corporation’s affairs).

97. See *Brands Take a Stand: When Speaking up About Controversial*

two strands: First, corporate officers and directors are ill-suited to make decisions beyond those dealing with economic concerns because directors and officers are selected for their business acumen rather than for their views on social issues or their ability to navigate the concerns associated with such issues.<sup>98</sup> Second, in light of the fact that people can disagree about the appropriate resolution of social issues, some argue that it is more appropriate for shareholders to make decisions for themselves regarding which social causes or issues they will support.<sup>99</sup> Warren Buffett best expresses this idea. Buffett is a committed philanthropist and has pledged that during his lifetime he will give away more than 99% of his wealth to charitable causes, and has asked other billionaires to do the same.<sup>100</sup> However, Buffett has expressed serious concern with corporations' ability to make charitable contributions because those contributions largely

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*Issues Hurts or Helps Business*, FORBES (Mar. 12, 2015, 9:19 AM), <https://www.forbes.com/sites/datafreaks/2015/03/12/brands-take-a-stand-when-speaking-up-about-controversial-issues-hurts-or-helps-business/#5d97cd09352d> (last visited Sept. 12, 2019) ("When companies engage in controversial social-political issues they ultimately risk the loss of profits and attention of activist groups that may result in the expenditure of additional resources . . .") (on file with the Washington and Lee Law Review).

98. See Friedman, *supra* note 58 (stating that corporate officers and directors have a duty to the shareholders to maximize stock value, and using corporate funds for "a general social interest" is spending someone else's money rather than serving as an agent of the stockholders).

99. See, e.g., H.R. 945, 105th Cong. (1st Sess. 1997) (seeking to amend the Exchange Act to allow shareholders the opportunity to participate in deciding the recipients of charitable donations); see also Dan Eberhart, *Corporate Resolutions on Social Issues Serve Activists, Not Shareholders*, FORBES (June 22, 2018, 6:50 AM), <https://www.forbes.com/sites/daneberhart/2018/06/22/corporate-resolutions-on-social-issues-serve-activists-not-shareholders/#25ac89ac743d> (last visited Sept. 12, 2019) (insisting that the aim of resolutions for change in the way corporations are governed has increasingly shifted from securing better returns to achieving political change) (on file with the Washington and Lee Law Review).

100. See Zack Friedman, *Why Warren Buffett Just Donated \$3.4 Billion*, FORBES (July 19, 2018, 8:32 AM), <https://www.forbes.com/sites/zackfriedman/2018/07/19/warren-buffett-bill-gates-charity/#2fd223d83e36> (last visited Sept. 12, 2019) (describing Buffett's charitable contributions) (on file with the Washington and Lee Law Review); see also Warren E. Buffett, *My Philanthropic Pledge*, THE GIVING PLEDGE, <https://givingpledge.org/Pledger.aspx?id=177> (last visited Sept. 12, 2019) (challenging "hundreds of rich Americans" to pledge at least 50% of their wealth to charity) (on file with the Washington and Lee Law Review).

reflect inclinations of corporate management.<sup>101</sup> As Buffett notes, “[j]ust as I wouldn’t want you to implement your personal judgments by writing checks on my bank account for charities of your choice, I feel it inappropriate to write checks on your corporate ‘bank account’ for charities of my choice. Your charitable preferences are as good as mine.”<sup>102</sup> Thus, Buffett created a program whereby shareholders—rather than corporate officers and directors—could designate the recipients of charitable contributions, though it has since been canceled.<sup>103</sup> The sentiment expressed by Buffett has appeal, especially when you think about the many social issues to be supported and when you think about the fact that many of those issues are contestable. I believe that too often, when people consider corporate social responsibility, they presume that corporations will support the social issues that they find valuable and beneficial. Today, a few groups have begun to promote issues in the social proposal space that appears antithetical to norms of equality and social justices.<sup>104</sup> This kind of promotion may amplify concerns around allowing corporations to engage in the pursuit of issues beyond profit. Some may raise the question: do

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101. See Warren E. Buffett, *Shareholder Designated Contributions*, BERKSHIRE HATHAWAY INC. (Oct. 14, 1981), <http://www.berkshirehathaway.com/2001ar/shcontri01.html> (last visited Sept. 12, 2019) (voicing his concerns that stockholder money is generally used to implement the charitable preferences of the corporate manager, who is “usually heavily influenced by specific social pressures on him”) (on file with the Washington and Lee Law Review).

102. *Id.*

103. See *Berkshire Hathaway Ends Shareholder Donation Plan*, DESERET NEWS (July 4, 2003), <https://www.deseretnews.com/article/994328/Berkshire-Hathaway-ends-shareholder-donation-plan.html> (last visited Sept. 12, 2019) [hereinafter *Berkshire*] (reporting that Berkshire’s directors terminated the charity contribution plan established in 1981 following “harmful criticism” of the program) (on file with the Washington and Lee Law Review).

104. See Wescott, *supra* note 71 (stating that the National Center for Public Policy Research (NCPPr) has sidelined several liberal policies by taking advantage of the SEC’s “first-to-file” rule); see also Mara Lemos Stein, *Gadfly Pushes Conservative Spin to Shareholder Resolutions*, WALL. ST. J. (Apr. 15, 2018, 1:20 PM), <https://www.wsj.com/articles/gadfly-pushes-conservative-spin-to-shareholder-resolutions-1523812814> (last visited Sept. 12, 2019) (reporting that the NCPPr is one of “a handful of right-leaning organizations” using shareholder resolutions to sideline left-leaning investors from proxy ballots) (on file with the Washington and Lee Law Review).

we really want corporations to begin using their economic and other resources in support of organizations that appear to discriminate in some way? Isn't that what could happen if we start allowing corporations to support social causes? In other words, there could be a troubling slippery slope in which corporate officers and directors not only support their pet charities, but also actively support organizations that are deemed offensive.<sup>105</sup>

While this concern is clearly valid, it does not negate the benefits of allowing corporations to focus on issues beyond profits for at least three reasons: First, because corporations are uniquely positioned to impact important social issues, there is significant benefit to allowing them to do so.<sup>106</sup> The corporation's sheer size and available resources means that corporations can have a greater impact on critical issues than any single individual could. What may be a significant amount of money for an individual—even a billionaire—may reflect a relatively small sum in comparison with a corporation's total assets and resources.<sup>107</sup> Because corporations have the ability to do more than individuals, leaving the charitable giving to individuals will inevitably mean significantly reducing the impact and benefit of such giving.

Second, there are many decisions that individuals simply cannot make, rendering it impossible to shift the responsibility related to supporting social issues onto those individuals and away from corporate officers and directors. For example, corporate law grants directors and officers the power to make a multitude of decisions that have significant consequences, including environmental, economic, and social ramifications.<sup>108</sup>

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105. See, e.g., Stein, *supra* note 104 (citing shareholder concerns over reports that General Electric had donated to the Clinton Foundation and Planned Parenthood).

106. See Friedman, *supra* note 100 (listing billionaires that have dedicated a large portion of their wealth to charity).

107. Compare *id.* (stating that 43% of Warren Buffet's wealth is approximately \$31 billion), with *AAPL Company Financials*, NASDAQ, <https://www.nasdaq.com/symbol/aapl/financials?query=balance-sheet> (last updated June 28, 2019) (last visited Sept. 12, 2019) (stating that Apple's total assets represent approximately \$365 billion) (on file with the Washington and Lee Law Review).

108. See Matthew Campbell & Jacqueline Simmons, *Why More Corporate*

Importantly, corporate law specifically prevents shareholders from making such decisions.<sup>109</sup> Then too, corporations' failure to make decisions also has significant social repercussions.<sup>110</sup> Once again, under corporate law, shareholders cannot compel directors to make these kinds of decisions. In light of this reality, it is not possible to shift the responsibility for making socially responsible business decisions to individual shareholders in the same way you can shift the responsibility about which organizations will receive charitable funding and resources. The argument about individual choice, therefore, has no force in this context.

Finally, and perhaps most importantly, the claim that corporations should not make value judgments problematically presumes that corporations are not already making value judgments.<sup>111</sup> The claim presumes that currently the economic decisions being made are separate from those associated with values. But that is not really true. This gets me back to what the SEC said with respect to Peck's proposals. When the SEC acknowledged that Peck's proposal was related to the business,

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*Agendas are Reflecting Social Issues*, INS. J. (Mar. 2, 2018), <https://www.insurancejournal.com/news/national/2018/03/02/482235.htm>

(last visited Sept. 12, 2019) (reporting that 60% of consumers in the United States say their decisions have been influenced by a company's politics) (on file with the Washington and Lee Law Review).

109. See, e.g., *Charlestown Boot & Shoe Co. v. Dunsmore*, 60 N.H. 85, 86 (1880) (concluding that the directors of a corporation manage the corporation's business and that shareholders cannot compel directors to take certain action).

110. See Tom Borelli, *Unilever and the Failure of Corporate Social Responsibility*, FORBES (Mar. 15, 2017, 12:36 PM), <https://www.forbes.com/sites/econostats/2017/03/15/unilever-and-the-failure-of-corporate-social-responsibility/#3bc48813498d> (last visited Sept. 12, 2019) (discussing the "financial and public relations damage" that CEO Paul Polman has caused company Unilever as a result of "his eagerness to put superficial feel good policies ahead of sound business decisions") (on file with the Washington and Lee Law Review); see also Oliver Hart & Luigi Zingales, *Serving Shareholders Doesn't Mean Putting Profit Above All Else*, HARV. BUS. REV. (Oct. 12, 2017), <https://hbr.org/2017/10/serving-shareholders-doesnt-mean-putting-profit-above-all-else> (last visited Sept 12, 2019) ("[M]any of the corporate choices, like the one to sell high-capacity guns, have social consequences that are not limited to economics.") (on file with the Washington and Lee Law Review).

111. See *Peck v. Greyhound Corp.*, 97 F. Supp. 679, 681 (S.D.N.Y. 1951) (repeating the corporation's stance that James Peck's proposal was inappropriate for shareholder vote because the proposal promoted a social cause).

but was inappropriate because it was designed to promote a cause,<sup>112</sup> it engaged in this same problematic presumption. But doesn't their analysis related to Peck apply with equal force to Greyhound? If Peck was promoting a social cause of desegregation, why wasn't Greyhound promoting a social cause of segregation? Is it because Greyhound's cause reflected the status quo? Because their cause reflected a business model? Arguably, the message appears to be that if your values are reflected in the status quo, they get to be characterized as a pure business or economic decision and thus valueless; but if you push back against the status quo, then you are advancing a cause.<sup>113</sup> Importantly, buried in this message is the reality that both sides are expressing and supporting a value. In other words, corporate actions are not value neutral. So we have to acknowledge the reality that corporations are run by men and women; that men and women have values; and that when men and women make business decisions, they do not necessarily leave their values at the door.<sup>114</sup> As soon as we recognize that reality, then we appreciate that the notion that corporations should not engage in value-based decisions is both descriptively and normatively impossible. Corporations are already engaging in the promotion of some social value and we need to shine a light on this fact, get a better understanding of the values they are supporting and repelling, and figure out what we think the appropriate set of values should be.

Thus, none of the reasons I have articulated are sufficient to suggest that corporations should not engage in social behavior. Corporations do not have to focus exclusively on profit and to do so would likely undermine their ability to be sustainable in the long-run.<sup>115</sup> Corporations are already balancing competing

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112. See *supra* note 34 and accompanying text (discussing how Peck's proposal was not a proper subject for shareholder action).

113. See *How Corporations Turned into Political Beasts*, BUS. INSIDER (Apr. 25, 2015, 12:00 PM), <https://www.businessinsider.com/how-corporations-turned-into-political-beasts-2015-4> (last visited Sept. 12, 2019) ("To the extent that large corporations benefit from the status quo, a hard-to-change status quo benefits large corporations.") (on file with the Washington and Lee Law Review).

114. See Buffett, *supra* note 101 (acknowledging that shareholders and corporate directors do not necessarily have the same social values).

115. See Fink, *supra* note 43 (explaining the link between long-term profits and social activism).



interests so it is not a good argument to suggest that they cannot be given the flexibility to do something they are already doing.<sup>116</sup> Corporations also do not make value neutral decisions, so once again it is not a good argument to suggest we would be doing something “new” and “radical” if we allowed corporations to make decisions with social and environmental repercussions.<sup>117</sup>

### *III. Shareholders as Social Activists*

Even as some acknowledge that corporations should serve a social purpose at some level, many people would disagree that shareholders should play a role in defining that purpose.<sup>118</sup> Lynn Stout engaged in influential scholarship related to team production and created a normative framework for understanding corporate officers and directors as mediators of the many different corporate constituents, including—but certainly not limited to—shareholders.<sup>119</sup> Lynn Stout fervently believed that a corporation can and should owe a duty to all of its corporate stakeholders.<sup>120</sup> However, Stout was very much against increased shareholder power, even referring to shareholder power as toxic.<sup>121</sup> In so doing, she discussed the parade of horrors that

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116. See Bainbridge, *supra* note 50, at 1438 (reasoning that directors are routinely expected to make difficult decisions).

117. See Patsy Doerr, *Four Ways Social Impact Will Affect Businesses in 2019*, FORBES (Jan. 14, 2019, 12:29 PM), <https://www.forbes.com/sites/patsydoerr/2019/01/14/four-ways-social-impact-will-affect-businesses-in-2019/#650a0cb66e71> (last visited Sept. 12, 2019) (remarking that the “rallying cry” behind corporations weighing in on social and political issues has been growing rapidly for several years) (on file with the Washington and Lee Law Review).

118. See Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2011 (2013) (“[C]hanges in corporate law and practice that make boards more attentive to shareholders’ interests can prove harmful . . .”); see generally Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907 (2013) (illuminating the consequences of overusing shareholder value maximization).

119. See Blair & Stout, *supra* note 91, at 276–87 (advocating for the “mediating hierarchy” model).

120. See *id.* at 304 (explaining that granting directors discretion to favor other constituencies will benefit shareholders’ “long-term interests”).

121. See Stout, *supra* note 118, at 2004 (“[I]ncreasing shareholders’ influence in public companies and driving managers to focus on share price to the exclusion of other considerations can help shareholders by harming

could come with increased shareholder power.<sup>122</sup> What does that parade look like?

### A. *Don't Take It Personal*

Some insist that granting shareholders the ability to influence corporate decision-making in this area is problematic because of the risk that shareholders will pursue their own personal agendas.<sup>123</sup> But there is an “app” for this risk. In other words, there is already a provision of the shareholder proposal rules that allows corporations to exclude proposals designed to advance a personal grievance.<sup>124</sup> Additionally, we need to be careful about what gets characterized as a personal grievance. An issue should not be considered a personal grievance simply because a shareholder may personally care about the issue or otherwise have some personal stake in the issue. Like with Peck, this fact on its own does not mean that the issue does not have broader social significance or otherwise direct implications for the corporation’s business.<sup>125</sup> Moreover, if an issue truly only involves a narrow personal concern, then it is extremely unlikely that it will garner enough support from shareholders to influence

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corporate creditors.”).

122. See Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1178–81 (2013) (stating that average S&P 500 life expectancies and annual returns have dropped since shareholder primacy theory took place); see also *id.* at 1179 (“If the American public corporation were a species, we would label it endangered.”).

123. See *infra* notes 128–130, 136 and accompanying text (discussing the tendency of “asocial” investors to selfishly seek short-term gains at the expense of other stakeholders).

124. See 17 C.F.R. § 240.14a–8 (2011) (providing for exclusions to proposals that “relate[] to the redress of a personal claim or grievance against the company or any other person” or to further a personal interest not shared by the shareholders at large).

125. See, e.g., Lydia DePillis, *Shareholder Activism is on the Rise, but Companies are Fighting Back*, CNN BUS. (Jan. 31, 2019, 4:04 AM), <https://www.cnn.com/2019/01/30/investing/activist-shareholders/index.html> (last visited Sept. 12, 2019) (acknowledging that while reducing greenhouse gas emissions is a moral imperative, it’s also “better for business”) (on file with the Washington and Lee Law Review).

corporate policies and practices.<sup>126</sup> Thus, the concern surrounding personal pursuits should not be significant enough to prevent shareholders from pursuing social issues beyond profit.

### *B. Toxic Shareholders?*

Stout and others also worry that shareholders do not really care about broader social concerns and thus will not use their power to advance those concerns.<sup>127</sup> This worry certainly has merit. There are some shareholders engaging in activism who clearly are not interested in promoting some social good.<sup>128</sup> Some shareholders' activism can have a negative impact not only on long-term profit, but also on other shareholders and stakeholders.<sup>129</sup> These shareholders engage in actions that undermine long-term value by focusing on policies aimed at bolstering short-term profit at the expense of diverting resources from research, development, and the long-term health and sustainability of the corporation.<sup>130</sup> These shareholders therefore engage in actions that could have a detrimental impact on shareholders, other stakeholders, and the broader community.

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126. See Brian Croce, *Reform Request on Shareholder Resolutions Drawing a Line in the Sand for Public Companies, Activists*, PENSIONS & INVS. (Mar. 18, 2019, 1:00 AM), <https://www.pionline.com/article/20190318/PRINT/190319881/reform-request-on-shareholder-resolutions-drawing-a-line-in-the-sand-for-public-companies-activists> (last visited Sept. 12, 2019) (referring to “zombie proposals”—those submitted three or more times without garnering majority support”) (on file with the Washington and Lee Law Review).

127. See Stout, *supra* note 118, at 2013, 2015 (suggesting that a shift to shareholder primacy may instead lead to the exploitation of other corporate stakeholders, rather than to the maximization of corporate and social value).

128. See Lynn A. Stout, *The Shareholder Value Myth*, CORNELL L. FAC. PUBLICATIONS 2 (2013), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2311&context=facpub> (acknowledging that “some shareholders may not care if their companies earn profits by breaking the law, hurting employees and consumers, or damaging the environment”).

129. See Joel Slawotsky, *Hedge Fund Activism in an Age of Global Collaboration and Financial Innovation: The Need for a Regulatory Update of United States Disclosure Rules*, 35 REV. BANKING & FIN. L. 275, 332–34 (2015) (presenting critics' view that shareholder activism “focuses on short-term profits at the expense of other stakeholders”).

130. See *id.* at 303 (acknowledging commentators' concerns that immediate wealth to shareholders imposes a risk to corporate and societal interests).

However, increasing shareholders' power has revealed that not all shareholders are the same and we cannot treat shareholders as if they have uniform interests. Just as there are shareholders who are not interested in other stakeholders and the broader health of the corporation, there are shareholders who do care about these issues.<sup>131</sup> Long-term shareholders certainly must care about other stakeholders.<sup>132</sup> Diversified shareholders are more likely to be concerned about impacts on the broader society and market.<sup>133</sup>

Shareholders who invest with an aim towards advancing social concerns—often referred to as socially responsible investors—certainly care about these other concerns. Perhaps more importantly, like Peck, many of these shareholders have been actively involved in the shareholder proposal process and thus have revealed a willingness to use their power and authority to advance issues that impact other stakeholders.<sup>134</sup> Hence, it is undeniable that some shareholders do care about these issues and are willing to engage around these issues.

While recognizing that some shareholders care, a greater concern is that the actions of those shareholders who care will be drowned out by those who do not care. Indeed, even Stout acknowledges that some shareholders have advocated on behalf of other stakeholders and in pursuit of issues beyond short-term profit.<sup>135</sup> However, she and others appear to believe that those

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131. See Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 83 (2008) (explaining that while there are shareholders with “short-term horizons” whose interests are narrowly focused on financial return, there are other investors who are willing to forego short term financial gain).

132. See Ribstein, *supra* note 64, at 1459 (“A firm’s long-run profits may depend significantly on satisfying the social demands of consumers, employees and local communities.”).

133. See Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 584–85, 588 (2006) (contrasting these investors with shareholders whose assets are less diversified because of heavy investment in firm-specific human capital).

134. See Fairfax, *supra* note 131, at 86 (noting that when the SEC removed the social cause exclusion in 1976, multiple shareholder groups began to use the proposal process to advance stakeholder-oriented concerns).

135. See Lynn A. Stout, *Takeovers in the Ivory Tower: How Academics are Learning Martin Lipton May Be Right*, 60 BUS. LAW. 1435, 1449 (2005) (admitting that both empirical evidence and “casual observation” demonstrates that money is not the only concern).

shareholders will be crowded out by shareholders that have agendas antithetical to the corporation's long-term health.<sup>136</sup> Two trends may ameliorate this concern: First, the growing consensus among the investment community that there should be focus on issues beyond profit decreases the likelihood that those issues will not be prioritized.<sup>137</sup> Second, the fact that currently the shareholders and members of the investment community who have raised social concerns happen to be some of the largest and most influential members of the investment community means that those shareholders cannot be drowned out.<sup>138</sup> Today, shareholders concerned about these issues include shareholders with significant resources as well as the ability *on their own* to influence the corporation and its officers and directors.<sup>139</sup> Thus, not only is BlackRock the world's largest investor, but together with Vanguard and State Street, they own some "40% of all

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136. See *id.* at 1451 (arguing that dissenting shareholders may prevent a board of directors from pursuing objectives in favor of stakeholders).

137. See *id.* at 1449 ("The increasing popularity of social investing demonstrates that a significant portion of the investing public would prefer to put their money into corporations that treat their customers and employees fairly . . .").

138. See Martin Lipton, *BlackRock Supports Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 18, 2018), <https://corpgov.law.harvard.edu/2018/01/18/blackrock-supports-stakeholder-governance/> (last visited Sept. 12, 2019) (confirming that Blackrock, one of the largest investment management corporations, publicly rejects Milton Friedman's shareholder-primacy governance model) (on file with the Washington and Lee Law Review); see also Andrew R. Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html> (last visited Sept. 12, 2019) ("[C]ompanies need to do more than make profits—they need to contribute to society as well if they want to receive the support of BlackRock.") (on file with the Washington and Lee Law Review).

139. See Jan Fichtner, et al., *These Three Firms Own Corporate America*, THE CONVERSATION (May 10, 2017, 2:14 AM), <https://theconversation.com/these-three-firms-own-corporate-america-77072> (last visited Sept. 12, 2019) (stating that the top three investment firms are individually the largest shareholders in almost 90% of companies listed on the S&P 500) (on file with the Washington and Lee Law Review); see also *The Rise of BlackRock*, ECONOMIST (Dec. 7, 2013), <https://www.economist.com/news/leaders/21591174-25-years-blackrock-has-become-worlds-biggest-investor-its-dominance-problem> (last visited Sept. 12, 2019) (stating that Blackrock is the "single biggest shareholder" of CitiGroup, Bank of America, JPMorgan Chase, Exxon Mobile, Shell, Apple, McDonald's and Nestle) (on file with the Washington and Lee Law Review).

publicly listed firms.”<sup>140</sup> Each of these entities has expressed strong support for corporate strategies that move beyond profit, have revealed a commitment to engage with corporations around these strategies, and have made it clear that they expect corporations to conform their policies accordingly.<sup>141</sup> Thus, even if BlackRock does not propose shareholder proposals around these issues or even vote in support of specific proposals, the mere fact that BlackRock has made a statement about the importance of social issues is significant and is likely to encourage corporations to begin paying heed to such issues.<sup>142</sup> Perhaps more importantly, such entities’ involvement means that shareholders can and will play a pivotal role in ensuring that such issues remain a focal point of corporate action.<sup>143</sup>

Then too, to the extent the concern expressed by Stout and others is basically a concern about the general propriety of increased shareholder power—that bus has left the station. Shareholder activism and engagement is the new normal.<sup>144</sup> The shareholders about whom people are most concerned—namely hedge funds—have the resources and incentives to influence corporate affairs without resort to the shareholder proposal process or any other traditional mechanism.<sup>145</sup> The antidote to

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140. Fichtner, *supra* note 139.

141. See TK Kerstetter, *A Sense of Purpose: Trends in Shareholder Engagement*, CORP. BOARD MEMBER (2018), <https://boardmember.com/a-sense-of-purpose-trends-in-shareholder-engagement/> (last visited Sept. 12, 2019) (“Not only are investors pushing boards to think more strategically about ESG, diversity, and long-term sustainable investment, they’re also pushing more shareholder communication around these topics.”) (on file with the Washington and Lee Law Review).

142. See Sorkin, *supra* note 138 (stating that BlackRock CEO Larry Fink has threatened all corporations to pursue social good or risk losing out on large investment funds’ support).

143. See *id.* (adding that Fink has pledged to hold companies accountable and to monitor corporate response to pressing social issues).

144. See *Director Essentials: Preparing the Board for Shareholder Activism Executive Summary*, NAT’L ASS’N CORP. DIRECTORS (Nov. 12, 2018), <https://www.nacdonline.org/insights/publications.cfm?ItemNumber=62968> (last visited Sept. 12, 2019) (describing year-round shareholder activism as the “new norm in the American boardroom”) (on file with the Washington and Lee Law Review).

145. See Fichtner, *supra* note 139 (pointing out that the top three hedge funds own about 90% of the voting power available in total for all publicly held corporations).

their activism, therefore, is not to alter that process. Instead, corporations need to reach out to other shareholders and build bridges with them.<sup>146</sup> And in fact, there appears to be a growing recognition by corporations and their advisors that one of the ways to counteract problematic shareholders is through shareholders with concerns broader than short-term profit maximization.<sup>147</sup> This means that increased shareholder power makes it more important than ever that corporations actually engage those shareholders concerned about other constituents and long-term sustainability. Corporations need such shareholders to be a part of the conversation and to actively engage if they want to prevent other shareholders from influencing the corporation in more problematic ways.

### C. Cost Concerns

Some insist that allowing shareholders to engage around these issues is too costly and too distracting.<sup>148</sup> To be sure, the shareholder proposal process does involve corporate costs and resources.<sup>149</sup> Corporations must craft a response to the proposals,

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146. See Lisa M. Fairfax, *Mandating Board-Shareholder Engagement*, 2013 U. ILL. L. REV. 821, 833 (2013) (“In this respect, shareholder engagement enables corporations and the board to fashion policies and practices that better reflect shareholder interests.”).

147. See Chris Ruggeri, *Investor Engagement and Activist Strategies*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 19, 2019), <https://corpgov.law.harvard.edu/2019/02/19/investor-engagement-and-activist-shareholder-strategies/> (last visited Sept. 12, 2019) (“These recent trends suggest that management should proactively engage with investors and be prepared for activists with strong points of view.”) (on file with the Washington and Lee Law Review); see also GREGORY, *supra* note 73, at 1–2 (positing that shareholder engagement is necessary to effectively run a corporation).

148. See Barry D. Baysinger & Henry N. Butler, *Modes of Discourse in the Corporate Law Literature: A Reply To Professor Eisenberg*, 12 DEL. J. CORP. L. 107, 125 (1987) (arguing that investors with “too much control” over managerial decision-making imposes excessive costs on the organization and permits other shareholders to “abuse the system”).

149. But see J. Robert Brown, Jr., *Corporate Governance, Shareholder Proposals, and Engagement Between Managers and Owners*, COLUM. L. SCH. (May 15, 2017), <http://clsbluesky.law.columbia.edu/2017/05/15/corporate-governance-shareholder-proposals-and-engagement-between-managers-and-owners/> (last visited Sept. 12, 2019) (commenting that “[t]he actual expense of adding a proposal to the proxy statement is ‘likely nominal’” and adds only a

which involves time and resources. To the extent corporations believe that the proposals should be excluded, they must engage in a no-action process that involves additional time and costs.<sup>150</sup>

However, opponents of shareholder engagement may have over-emphasized the extent of the cost to public corporations. A recent study reveals that “most public companies do not receive any shareholder proposals.”<sup>151</sup> On average, 13% of Russell 3000 companies in a 13-year span—from 2004–2017—received a shareholder proposal.<sup>152</sup> This translates into the average Russell 3000 company receiving a proposal once every 7.7 years.<sup>153</sup> “For companies that receive a proposal, the median number of proposals is one per year.”<sup>154</sup> Those are the numbers and the reality. Then too, some of the cost is self-inflicted. While it is certainly true that there is extra time, attention, and cost associated with engaging in the no-action process, there are arguably instances when engagement in that process is not necessary and those costs are avoidable—for example, the Peck proposal.

The argument about costs also appears to fail to consider the long-term consequences of ignoring these kinds of shareholder proposals and these kinds of issues. Many are not willing to speculate about what would have happened if Peck’s proposal had made it onto the proxy statement. But let’s speculate. It is possible that nothing would have happened;

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“modest amount of volume” since companies must draft and circulate the proxy materials to shareholders anyways) (on file with the Washington and Lee Law Review).

150. See Patricia R. Uhlenbrock, *Roll Out the Barrel: The SEC Reverses Its Stance on Employment-Related Shareholder Proposals Under Rule 14a-8—Again*, 25 DEL. J. CORP. L. 277, 283 (“If management wishes to exclude a proposal from the corporation’s proxy materials, it has the burden of demonstrating a basis . . . for excluding the proposal.”); see also *id.* (explaining that management must “submit to the SEC staff six copies of the proposal, any supporting statements of counsel, and management’s justification for leaving the proposal out of its proxy solicitation”).

151. See JONAS KRON & BRANDON REES, FREQUENTLY ASKED QUESTIONS ABOUT SHAREHOLDER PROPOSALS 1, [https://www.cii.org/files/10\\_10\\_Shareholder\\_Proposal\\_FAQ\(2\).pdf](https://www.cii.org/files/10_10_Shareholder_Proposal_FAQ(2).pdf) (adding that “[l]ess than half of all submitted proposals actually go to a vote”).

152. *Id.*

153. *Id.*

154. *Id.*



shareholders would have voted it down in overwhelming numbers and management would have been free to ignore it. And this possibility seems very real in light of the fact that at the time, the proposal—along with Greyhound’s actions with respect to the proposal—received very little attention. To be sure, to the extent this possibility is the most likely one, it makes my earlier point that the cost of putting the proposal on the proxy statement would have been relatively minor when viewed against the legal and other costs associated with the corporation’s efforts to exclude the proposal.

However, by allowing the proposal to appear on the proxy statement, management would have had to respond and make a statement about the propriety of its current system. Maybe that response would have prompted a more robust conversation about social trends and their impact on Greyhound’s business. Maybe that response could have prompted an evaluation about how best to respond to changes that had the potential for altering their business model. Maybe that response could have prompted an evaluation about how best to respond to activism directed at buses and their role in interstate travel. Certainly the absence of those conversations and evaluations meant that, ten years later, the Greyhound bus—and hence its business—was featured on the front page of every newspaper in a way that I am sure no one at Greyhound would have wanted to happen.<sup>155</sup> While it is not clear what, if anything, would have resulted from the appearance of Peck’s proposal on the proxy statement, it also is clear that we will never know. In addition, it seems clear that corporations

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155. See, e.g., Fred Davenport, *Freedom Rider Recounts Horror on Greyhound Bus in Anniston*, WVTM13, <https://www.wvtm13.com/article/freedom-rider-recounts-horror-on-greyhound-bus-in-anniston/3427729> (last updated May 16, 2016, 12:04 AM) (last visited Sept. 12, 2019) (recounting the events of the Mother’s Day 1961 Freedom Ride attack) (on file with the Washington and Lee Law Review); Josh Moon, *Witness to Freedom Riders Attack Describes Scene*, MONTGOMERY ADVERTISER (May 19, 2014), <https://www.montgomeryadvertiser.com/story/news/local/2014/05/19/witness-freedom-riders-attack-describes-scene/9303969/> (last visited Sept. 12, 2019) (same) (on file with the Washington and Lee Law Review); *Archival Photos from the May 14, 1961 Freedom Ride Attacks in Anniston*, ANNISTON STAR (Jan. 12, 2017), [https://www.annistonstar.com/archival-photos-from-the-may-freedom-ride-attacks-in-anniston/collection\\_d612321e-d928-11e6-a6c4-df0db3acf8c4.html](https://www.annistonstar.com/archival-photos-from-the-may-freedom-ride-attacks-in-anniston/collection_d612321e-d928-11e6-a6c4-df0db3acf8c4.html) (last visited Sept. 12, 2019) (containing archived pictures of the Greyhound bus on fire) (on file with the Washington and Lee Law Review).

must do a better job of trying to consider the long-term costs of both their actions and their inactions, and that those who push against shareholder proposals around these issues may not be doing sufficient work in evaluating those costs.

#### *D. Shareholders as Canaries*

Finally, it must be pointed out that the shareholder proposal landscape has been an important platform for social issues.<sup>156</sup> If you look at the history of shareholder proposals, you will see that many of the most prominent social issues were the subject of a shareholder proposal—busing and discrimination, apartheid, gender equity, board diversity, and environmental concerns.<sup>157</sup> Not only were such issues the subject of a shareholder proposal, but often they pre-dated the broader movement and broader acceptance of those issues.<sup>158</sup> These issues started off as a push among smaller shareholders and have now gained traction within the broader investment community, and broader society generally. In other words, issues that began on the margins in the shareholder proposal arena have become mainstream, embraced by larger segments of the investment community.<sup>159</sup> This highlights two important facts: One, it is important for corporations to pay attention to developments in the shareholder proposal space because those developments may be a strong signal of future trends.<sup>160</sup> In this regard, a robust shareholder

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156. See JAMES D. COX & THOMAS L. HAZEN, COX & HAZEN ON CORPORATIONS 781 (2d ed. 2003) (confirming that public interest groups have utilized Rule 14a-8 to bring social and political issues before shareholders).

157. See, e.g., Letter from M. Hughes Bates, Special Counsel, Div. of Corp. Fin., SEC, to Byron B. Rooney, Davis Polk & Wardwell LLP (Apr. 24, 2019), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/arjunacapital042419-14a8.pdf> (discussing a shareholder proposal entitled “Gender Pay Equity” that seeks to address the impact of the pay gap on the economy and the “related impacts on stock performance and emerging public policy risks”).

158. See Fairfax, *supra* note 131, at 91 (“A recent examination of shareholder activism related to social proposals suggests that shareholders play a critical role in both prompting dialogue on stakeholder issues and eventually legitimizing those issues so that corporate managers and other shareholders take them seriously.”).

159. See *id.* (arguing that shareholder activism plays an important role in building momentum in social movements).

160. See *id.* at 92 (reasoning that shareholders draw public attention to

proposal platform is critical to corporate governance as a vital source of information for directors and officers.<sup>161</sup> Two, it takes some time for issues that appear on the shareholder proposal landscape to ripen and gain support from the broader investment community.<sup>162</sup> Hence, we should be cautious with respect to efforts to remove these proposals in their early stages before gaining a better understanding of whether such proposals will actually ripen into issues embraced by broad segments of the population.

Thus, shareholders can and should play a pivotal role in advancing issues beyond profit. These issues are not just personal, so that concern should not prevent shareholders' active engagement around these issues. More and more shareholders have demonstrated that they care deeply about issues of social significance because those issues impact the long-term sustainability of the corporation.<sup>163</sup> In addition, such shareholders are influential, and they cannot be drowned out. Rather than repelling these shareholders, corporations should step up their engagement with them because collaboration with these shareholders may enable the corporation to better respond to those who seek to undermine the corporation's long-term health and sustainability.<sup>164</sup>

#### IV. What to Watch?

Finally, what to watch? There are many areas about which we should be mindful to ensure that corporations continue to

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important social issues by increasing their visibility and ultimately, their legitimacy).

161. See *id.* at 91 (“[S]hareholders’ use of the proposal process prompts corporations not only to consider social issues, but also to generate the corporation’s position on those issues.”).

162. See Croce, *supra* note 126 (explaining that institutional investors must first “analyze an issue, develop practical guidelines, and [wait] for a consensus to emerge”).

163. See Sawyer & Trevino, *supra* note 65 (listing the current trends in social activism and warning shareholder activists to focus on long-term strategy).

164. See Fairfax, *supra* note 131, at 92 (encouraging management to foster discussions with concerned shareholders regarding “the most appropriate business solutions to the given issues raised”).

have the flexibility to focus on issues beyond short-term profit and that shareholders can play a role in that focus.

Since my talk has focused on shareholder proposals, I will focus on an issue in the shareholder proposal realm—reforms related to the shareholder proposal rule. There has always been some effort to modify the shareholder proposal rule, or in some instances, to completely abandon the rule.<sup>165</sup> Currently there are several procedural reforms on the table that seek to alter the ownership and resubmission thresholds.<sup>166</sup> We need to keep an eye on these reforms. Changes related to the ownership or resubmission thresholds often have the most significant implications for social proposals because historically those proposals were submitted by shareholders with smaller holdings and relatively low levels of support.<sup>167</sup> Indeed, often such rule changes are made for the purpose of excluding shareholders who would advocate for social concerns.<sup>168</sup> Keep in mind, the price of admission for Peck was three shares. Because of past rule changes to ownership thresholds, Peck could not get into the corporate meeting door today with that level of ownership. Hence, we need to pay close attention to these changes and their potential impact.

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165. See Susan W. Liebler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 426 (1984) (concluding that the costs of Rule 14a-8 significantly exceed its benefits “[b]ecause it is an unwise and unwarranted intrusion into private transactions, private markets, and state corporation law”).

166. See Croce, *supra* note 126 (“A call to action was renewed again last month when more than 300 companies signed a N[ASDAQ] letter to the SEC urging proxy-system reforms, including raising the resubmission thresholds.”).

167. See A.A. Sommer, Jr., *Shareholder Proposals*, C533 ALI-ABA 1925, 1941–42 (1990) (explaining that early shareholder activism began with pioneer activist Lewis Gilbert, a small shareholder who began challenging corporate action in 1932).

168. See Palmiter, *supra* note 51, at 888 n.32 (explaining that the minimum ownership requirement was meant “to assure that shareholders seeking to use the process are indeed investors . . . rather than activists . . . using a share of stock as the passkey to the proxy bullhorn”).

### V. Conclusion

We gather today during Black History Month. Thus, it seems particularly appropriate that we discuss civil rights and that I conclude with some words from one of the great leaders of the Civil Rights Movement. Martin Luther King, Jr. gave a speech towards the end of his life entitled “The Other America,” in which he spoke about two Americas—one where “millions of people have the milk of prosperity and the honey of equality flowing before them,” while in the other America people search for jobs that do not exist, live in sub-standard housing conditions, and are deprived of adequate educational opportunities.<sup>169</sup> King noted that “[p]robably the most critical problem in the other America is the economic problem.”<sup>170</sup> Towards the end of the speech, King defended his decision to talk about economic issues in response to critics who insisted that he should stick to civil rights and not deal with issues related to the war or jobs or the economy.<sup>171</sup> In response, King stated, “I have been working too long and too hard” against segregation “to end up at this stage of my life segregating my moral concern. I must make it clear. For me justice is indivisible. Injustice anywhere is a threat to justice everywhere.”<sup>172</sup> I am sure many of you are familiar with that quote from King, but you may not be familiar with the fact that the quote was made in reference to economic rights and economic justice. In his speech and in that quote, King was emphasizing the fact that economic systems embody values, and that our economic decisions can and need to be just.<sup>173</sup> King was debunking the myth that we could separate our business decisions from the impact of those decisions on the broader

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169. Martin Luther King, Jr., *The Other America* 1 (Mar. 14, 1968), <https://www.gphistorical.org/mlk/mlkspeech/mlk-gp-speech.pdf>.

170. *Id.*

171. *See id.* at 6

I think it would be rather absurd for me to work for integrated schools and not be concerned about the survival of the world in which to integrate . . . [T]here comes a time when one must take a position that is neither safe nor politics nor popular but he must do it because conscience tells him it is right.

172. *Id.*

173. *See id.* at 2 (discussing the disparate economic conditions of the black and white communities).

economy and society.<sup>174</sup> King also was putting out a call to arms to our businesses and those working with and for those businesses and saying we must live together; we must work together; we must pursue justice together.<sup>175</sup>

Corporations can be just. Corporations can be equitable. Corporations can be socially responsible. Corporations have demonstrated over and over again that they can and will do good. We just have to support them in that endeavor.

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174. See *id.* at 7 (“[I]n this pluralistic, interrelated society we are all tied together in a single garment of destiny, caught in an inescapable network of mutuality.”).

175. See *id.* at 8 (“With this faith we will be able to speed up the day when all of God’s children all over this nation—black men and white men, Jews and Gentiles, Protestants and Catholics will be able to join hands and sing . . .”).